



of this proceeding would be contrary to the Commission's Rules regarding the stay of proceedings in conjunction with disqualification appeals. See Section 1.245(b)(4) of the Commission Rules (calling for suspension of a hearing pending a ruling on disqualification by the Commission).

The United States Court of Appeals for the District of Columbia enumerated the following four factors, in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (1977) (hereinafter "WMATA"), to be applied in deciding motions to stay administrative orders:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) [h]as the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings . . . (4) Where lies the public interest?

WMATA, 559 F.2d at 841, quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

The Commission has concluded that these factors are to be applied in FCC proceedings. Station KDEW(AM), 4 C.R. 1399, 1400 (1996). Application of each of these factors favors the issuance of the requested stay in this proceeding:

(1) *Likelihood of Success on the Merits:*

Kay has a high probability of success on the merits of the Petition. The Petition is based on new evidence, obtained after the release of the Commission Order, which indicates that ex parte communications may have occurred in violation of the Commission Rules. This new evidence presents three separate grounds for the Commission to reconsider the Commission Order: (1) the Commission Rules themselves require reconsideration upon the discovery of new evidence; (2) the new evidence negates the reasons for denying the Motion to Disqualify

previously submitted in this proceeding; and (3) the new evidence is indicia of possible negative influence upon the Presiding Officer in the absence of Kay being able to respond. Each of these grounds independently justifies granting the Petition, giving the Petition a high probability of success.

(2) *Irreparable Injury to Kay:*

Kay's FCC licenses are at stake in these proceedings. Without the imposition of a stay pending the Commission's consideration of the Petition, these proceedings may be subject to the taint of ex parte communications and any bias that may result therefrom. Any such bias will injure Kay's chances of fairly presenting his case to the Presiding Officer, irreparably harming his economic livelihood.

(3) *Whether the Issuance of a Stay Will Harm Other Interested Parties:*

There are no other interests at stake in these proceedings beyond Kay's right to retain his FCC licenses, and no other interests will be harmed.

(4) *Where Lies the Public Interest:*

The public interest in this matter lies in fair and effective administrative adjudication. The absence of even the appearance of bias which may result from ex parte communications is crucial to serving this interest. United States v. Hollister, 746 F.2d 420, 425 (8<sup>th</sup> Cir. 1984) ("[a]voiding even the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself"). Thus, a stay pending the Commission's consideration of the Petition and possible investigation of ex parte communications to the Commission is crucial to serving the public interest.

Prior FCC cases have found that a stay pending a consideration of possible ex parte violations is proper. See, e.g., In re Application of American Broadcasting Co., Inc. (ABC), 23 FCC2d 136 (1970); Midwest Television, Inc., 1 FCC2d 1345 (1965) (authorizing stay of pending proceedings by the Review Board until completion of consideration of ex parte claims). This matter is similar in that the issue of ex parte communications is presently before the Commission on reconsideration. As a result, the above-captioned proceeding should be stayed until the Commission's consideration of the Petition is complete.

The Wireless Telecommunications Bureau will not be prejudiced by the stay requested herein because this case has been pending for almost three (3) years, giving the Bureau ample time to complete its investigation and prepare its case for hearing.

#### **CONCLUSION**

WHEREFORE, for the reasons set forth above, Kay requests that the Commission stay all further proceedings in this proceeding until it rules on Kay's Petition for Reconsideration and all investigations ordered by it have been completed.

Respectfully submitted,

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Dated: October 31, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Motion to Stay Proceedings was hand-delivered on this 31<sup>st</sup> day of October, 1997 to the following:

John I. Riffer  
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and sent via first-class mail, postage prepaid on this 31<sup>st</sup> day of October, 1997 to:

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Scott A. Fenske